



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 8, 2004

Mr. J. Greg Hudson
Thomas, Hudson & Brustkern, L.L.P.
3305 Northland Drive, Suite 301
Austin, Texas 787831

OR2004-2875

Dear Mr. Hudson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 198999.

The Brewster County Sheriff and the Brewster County Attorney (collectively, the "county"), which you represent, received a request for information regarding criminal cases referred to the county attorney for prosecution since January 1, 1997. The requestor specifically asks for the following information regarding each case: referring law enforcement agency; name of defendant; crime alleged; date of offense; date referred for prosecution; date of disposition; and information regarding the disposition of the case. In addition, the requestor seeks records of cases and dates officers have appeared at trial for cases being prosecuted by Steve Houston, and reports prepared for or submitted to the Office of the Attorney General concerning cases handled by the county attorney since January 1, 1997. You indicate that some responsive information will be released to the requestor. You claim, however, that portions of the information at issue are excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹ In your submission of February 9, 2004 you indicate that the county no longer intends to raise sections 552.132 and 552.1325 of the Government Code as exceptions to disclosure.

² We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You have submitted six exhibits of responsive documents that are representative of six different types of responsive information. We begin by noting that Exhibits 1, 3, 4, 5, and 6 include information that is subject to section 552.022(a)(1) of the Government Code, which provides in pertinent part:

(a) . . . [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Exhibits 3, 4, 5, and 6 consist of completed investigations, and Exhibit 1 contains a completed offense report. The department must release Exhibits 3, 4, 5, and 6 and the completed offense report in Exhibit 1 unless this information is excepted from disclosure under section 552.108 or confidential under other law.

As you contend that Exhibits 3, 4, and 5 are excepted under section 552.108, we will address your claim under that exception for Exhibits 3, 4, and 5. Moreover, you contend that the completed investigation submitted as Exhibit 6 is confidential by law; accordingly, we will address that contention with respect to Exhibit 6. However, you contend that the information in Exhibit 1 is excepted under section 552.103 of the Government Code, which is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not "other law" that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the county may not withhold the completed report in Exhibit 1, which we have marked, under section 552.103 of the Government Code.

We will, however, address your claim under section 552.103 with respect to the remaining information in Exhibit 1 that is not subject to section 552.022(a)(1) of the Government Code. Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

You indicate, and the documents reflect, that Exhibit 1 pertains to a pending criminal case that is being prosecuted by the Brewster County Attorney's Office. Thus, you state that the county was involved in pending litigation on the date the county received the present request, and you state that the responsive information in Exhibit 1 pertains to the pending litigation. Based on your representations and our review, we agree that section 552.103 is generally applicable to the information in Exhibit 1 that is not subject to section 552.022(a)(1) of the Government Code. We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information in Exhibit 1 that has either been obtained from or provided to the opposing party in the pending lawsuit is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next address your claim under section 552.108 for the information in Exhibits 3, 4, and 5. You contend that this information is excepted from disclosure under section 552.108(a)(2) of the Government Code. Section 552.108(a)(2) excepts information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication.

You advise that Exhibit 3 relates to a case that was declined for prosecution by the county attorney, and you state that Exhibit 5 relates to a case in which the defendant received pre-trial diversion. Upon review, we agree that Exhibits 3 and 5 relate to criminal cases that

concluded in a final result other than conviction or deferred adjudication, and we agree that section 552.108(a)(2) is generally applicable to this information.

We note, however, that basic information about an arrested person, an arrest, or a crime is not excepted from disclosure under section 552.108. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976). See Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of basic information, we determine the county may withhold Exhibits 3 and 5 from disclosure pursuant to section 552.108(a)(2).

With respect to the information in Exhibit 4, however, we note that Exhibit 4 relates to a case in which the defendant pleaded guilty or nolo contendere and was adjudged guilty of a misdemeanor offense. See Crim. Proc. Code art. 27.02(5) (plea of nolo contendere is equivalent of plea of guilty for purposes of criminal prosecution); *Ex parte Williams*, 703 S.W.2d 674, 678 (Tex. Crim. App. 1986) (plea of nolo contendere admits every element of the offense and is legally sufficient in itself to support a misdemeanor conviction). Thus, Exhibit 4 does not relate to a criminal case that concluded in a final result other than conviction or deferred adjudication. We therefore determine that the county may not withhold the information in Exhibit 4 pursuant to section 552.108(a)(2).

Next, we address the county's claims under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. You contend that the information in Exhibit 6 is confidential under section 58.007 of the Family Code. We note that section 58.007 is "other law" that can make information confidential for purposes of section 552.022 of the Government Code. Accordingly, we address your claim under section 58.007 with respect to the information in Exhibit 6. Section 58.007(c) provides in pertinent part as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). The information in Exhibit 6 involves juvenile criminal conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply. Thus, we find that Exhibit 6 is confidential pursuant to section 58.007(c) of the Family Code and must be withheld in its entirety under section 552.101.

Next, the documents in Exhibit 4 contain fingerprint information that is subject to sections 560.001, 560.002, and 560.003 of the Government Code. Sections 560.001, 560.002, and 560.003 are "other law" that can make information confidential for purposes of section 552.022 of the Government Code, and provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Upon review, we find section 560.002 does not permit the disclosure of the fingerprint information in Exhibit 4 in this instance. Therefore, the county must withhold the fingerprint information, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

Criminal history record information ("CHRI") is confidential and not subject to disclosure. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). However, the definition of CHRI does not include driving record information maintained by DPS under chapter 521 of the Transportation Code. *See* Gov't Code § 411.082(2)(B). We have marked CHRI in Exhibit 1, Exhibit 2, and Exhibit 4 that the county must withhold pursuant to section 552.101 of the Government Code in conjunction with state and federal regulations.

We note that Exhibit 4, and the completed offense report in Exhibit 1, contain social security numbers that may be excepted from disclosure under section 552.101 of the Government Code in conjunction with federal law. A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the county pursuant to any provision of law enacted on or after October 1, 1990.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are protected by common-law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked a small amount of information in the completed offense report in Exhibit 1 that is protected by common-law privacy and must be withheld under section 552.101 of the Government Code.

Finally, we note that Exhibits 1, 2, and 4 contain information that is excepted under section 552.130 of the Government Code, which provides in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;
- (2) a motor vehicle title or registration issued by an agency of this state; or
- (3) a personal identification document issued by an agency of this state[.]

Gov't Code § 552.130. We have marked the information the county must withhold under section 552.130.

In summary, with the exception of the completed offense report we have marked, the county may withhold the information in Exhibit 1 pursuant to section 552.103 of the Government Code. With the exception of basic information, the county may withhold Exhibit 3 and Exhibit 5 pursuant to section 552.108(a)(2) of the Government Code. The county must withhold Exhibit 6 pursuant to section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. We have marked the fingerprint information in Exhibit 4 that must be withheld under section 552.101 in conjunction with section 560.003 of the Government Code. We have marked criminal history record information in Exhibit 2 and Exhibit 4 that must be withheld under section 552.101 of the Government Code in

conjunction with chapter 411 of the Government Code and federal law. Social security numbers may be excepted under section 552.101 in conjunction with federal law. We have marked information in the completed offense report in Exhibit 1 that must be withheld under section 552.101 in conjunction with common-law privacy. We have marked information in the completed offense report in Exhibit 1, as well as information in Exhibit 2 and Exhibit 4, that must be withheld under section 552.130 of the Government Code. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Saldivar', with a stylized flourish at the end.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 198999

Enc: Submitted documents

c: Ms. Kay A. Nehring
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(w/o enclosures)